4 8 2 1897 182

Supreme Court, U.S.
FILED
OCT 16 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

GEORGE L. WHITMAN,
Petitioner,

vs.

NATIONAL BANK OF OXFORD,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

JOSEPH H. CHOATE,
WILLIAM G. WILSON,
Of Counsel for Petitioner.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.—*Ex Parte* GEORGE L. WHITMAN, Petitioner.

Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Second Circuit to certify to the Supreme Court, for its review and determination, the case of George L. Whitman, plaintiff in error, versus National Bank of Oxford, defendant in error.

To the Honorable the Supreme Court of the United States:

The petition of George L. Whitman, plaintiff in error, respectfully shows to this Honorable Court as follows:

First. Your petitioner is a citizen of the United States, residing in the City and State of New York.

Second. On or about May 29, 1895, the National Bank of Oxford brought an action in the Circuit Court of the United States, for the Southern District of New York, against your petitioner upon the cause of action hereinafter stated; and in its complaint therein said National Bank of Oxford alleged that your petitioner was a stockholder of a certain corporation of the State of Kansas known as the Arkansas City Investment Company, and was, as such stockholder, liable to the plaintiff, said National Bank of Oxford, for the amount of a judgment alleged to have been theretofore recovered by said National Bank of Oxford against the said Kansas corporation in a court of the State of Kansas; and the relief demanded in said action against your petitioner was a judgment against him for the amount of the said judgment of the said Kansas Court against said Kansas corporation, with interest thereon and costs. Said complaint set forth said provisions of the Constitution and Statutes of the State of Kansas as fixing the liability of your petitioner to action

and recovery thereunder in said Circuit Court of the United States for the Southern District of New York.

THIRD. Your petitioner answered the said complaint and among other defenses thereto maintained in his said answer that said Circuit Court of the United States for the Southern District of New York had not jurisdiction of the subject of the action or of the subject of the cause of action alleged in said complaint, and that the said complaint did not state facts sufficient to constitute a cause of action.

FOURTH. Thereafter the issues raised by said complaint and answer were brought to trial before the Honorable HOYT H. WHEELER and a jury in said Circuit Court of the United States, on June 10, 1896; and thereupon, at the close of such trial, after the taking of oral and documentary evidence, both parties having rested, a verdict was directed in favor of said National Bank of Oxford against your petitioner, for the amount of said Kansas judgment against said Kansas corporation, and interest thereon and costs of said action in the Circuit Court of the United States, to which direction and action of the Court said petitioner duly excepted.

FIFTH. Thereafter your petitioner made a motion to set aside the said verdict, which motion was denied, your petitioner duly excepting to such denial, and judgment was thereupon entered in favor of said National Bank of Oxford against your petitioner for $4,205.48, with interest thereon at the rate of ten per cent. per annum.

SIXTH. Thereafter your petitioner made up his bill of exceptions to review such judgment and proceedings, and took out a writ of error to review the same; and such writ of error was thereafter brought before the United States Circuit Court of Appeals for the Second Circuit, and argument having been had thereon said Circuit Court of Appeals thereafter rendered a decision for the affirmance of the judgment of said United States Circuit Court, which decision is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NATIONAL BANK OF OXFORD

v.

GEORGE L. WHITMAN.

The Constitution of the State of Kansas provided, prior to the year 1866, and still provides, in Section 2 of Article XII., as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law, but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

Section 32 of Chapter 23 of the General Statutes of Kansas of 1868, Section 40 of the same chapter, as amended in 1883, and Section 44 of the same chapter, which are still the statutes of the State, provided as follows:

"SECTION 32. If an execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such Court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"SECTION 40 (as amended): A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall, for three months after the passage of this act, fail to resume its usual and ordinary business."

"SECTION 44: If any corporation created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation to such suit; and, if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The Arkansas City Bank was formed in 1886, under the laws of the State of Kansas, to do a banking and real estate business with a capital of $20,000, divided into 2,000 shares of $100 each, and was located in Arkansas City in said State. The original stockholders, their residences and the number of the shares of each stockholder were as follows:

George L. Whitman, New York City	1,000 shares.
Samuel Newell, " " "	649 "
James L. Huey, Arkansas City	349 "
Mary L. Newell, New York City	1 "
Mary E. Huey, " " "	1 "

In 1889 the name of the bank was changed and became the Arkansas City Investment Company. In December, 1890, it made

a general assignment for the benefit of its creditors, and from that time completely suspended its business, and thereafter, at the expiration of one year, was deemed to be dissolved under the provisions of Section 40 for the purpose of enabling its creditors to sue its stockholders. About four months before its failure it endorsed and guaranteed for value two promissory notes, together amounting to $4,875, which were discounted by the plaintiff the National Bank of Oxford, located in Pennsylvania. The assignee made payments upon these notes from time to time; but, in 1895, the plaintiff duly obtained judgment against the bank, in a State Court of Kansas, for the sum of $3,468.30, the bank having appeared and having made answer to the complaint. An execution upon this judgment was returned to court wholly unsatisfied, and it appeared that the bank had at that time no assets or property. The plaintiff thereupon brought an action at law in the Circuit Court for the Southern District of New York against the defendant George L. Whitman, being the owner of one thousand shares of the stock of this bank, to recover from him the amount due to the plaintiff from said bank. The complaint in the action alleged all the foregoing facts. The defendant had not, theretofore, been subjected to any liability as a stockholder of the bank.

At the close of the trial of this suit before a jury, each party moved for the direction of a verdict in its favor. The Court directed a verdict in favor of the plaintiff for the amount of the Kansas judgment, with interest.

To reverse the judgment entered upon this verdict a writ of error was brought. The principal question presented by the assignments of error was as to the character of the remedy provided by the Kansas statutes against a stockholder of an insolvent corporation; whether it was a special, peculiar and local remedy created by the statute and without force and not capable of being enforced outside of the limits of the State of Kansas.

SHIPMAN, C. J.:

It will be observed, that the complaint contains the averments which are required either by Section 32 or Section 44, and seeks to enforce an alleged liability of the defendant, whether he is to be charged with the amount of the Kansas judgment or with the amount of the debt due to the plaintiff from the corporation, and it is to be further noticed that not only the fact of the judgment was proved, but that also all the facts upon which the judgment was

based, such as the guaranty, the discount and the nonpayment, were proved, so that the question which is often raised as to the force and effect of the original judgment and how much it establishes against the stockholder is immaterial. The plaintiff has proved all the facts that are to be proved, whether the judgment conclusively established against the stockholders the indebtedness of the bank, or was only *prima facie* evidence of it, or was no evidence of the indebtedness, but was merely a condition precedent to a suit against the stockholder.

The main question in the case, whether a suit to enforce the liability declared by the Constitution of Kansas and provided by its statutes, was transitory in its character and could be brought by an action at law in a court of another State against a single stockholder who was a resident of such State, has already been stated.

It is to be premised, as was clearly shown by Justice CLIFFORD in Morley vs. Thayer, 3 Fed. Rep., 739, with respect to this particular constitutional provision, that it is not self-executing in its character, and that statutory legislation was therefore required to carry it into effect (Grover vs. Slaughter, 15 Pet., 449; Wells vs. Robb, 43 Kan., 201). It is also to be premised, as stated in Pollard vs. Baily, 20 Wall., 520, and reaffirmed in Fourth National Bank vs. Francklyn, 120 U. S., 747, that the statutory remedy is exclusive. "A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But, when the provision for a liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

Two other decisions have been recently given by the Supreme Court which do not undertake to construe this class of statutes, but which are important because they declare the conclusion which must naturally follow, if the plaintiff's construction has been established by the highest Court of Kansas, and because they show the particulars in this class of statutes, which the Supreme Court regards as especially significant upon the question of construction.

The case of Flash vs. Conn, 109 U. S., 371, was based upon a provision in a general act of the State of New York for the formation of corporations, that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified. The Court, after saying that great, if not conclusive, weight must be given to the construction which the

highest Court of New York had placed upon the statute, and that, following such construction, the liability was in contract, said that "it can be enforced by an action sounding in contract against a stockholder found in another State," and that a resort to equity was not necessary, but an action at law was adequate. Upon the last point the Court said: "Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the cases of Pollard vs. Bailey, 20 Ward, 520; Terry vs. Tubman, 92 U. S., 156, to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders. This, the Court held, could only be done by a suit in equity.

"But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company, and sued out an execution thereon which has been returned unsatisfied, may sue any stockholder, and no other creditor can."

This decision was not novel in its character, although its doctrine had not been universally controlling in the State Courts; but, in Huntington vs. Attrill, 146 U. S., 657, the Supreme Court stated its position in regard to the duty of a Court of one State to enforce a statute of another State, which was penal in the popular sense, and a position which was not in accordance with the obiter remarks of the Justice who delivered the opinion of the Court in Steam Engine Co. vs. Hubbard, 101 U. S., 188, 192. The Huntington case grew out of a statute of the State of New York, which made the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock, liable for all its debts, and the question was whether such a statute was so penal in its character that it could not be enforced in the courts of another State. The Court said: "As the statute imposes a burdensome liability on the officers for their wrongful act it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the

creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground on principle for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country."

It becomes, therefore, of prime importance to ascertain what the highest Court of Kansas has said in regard to the transitory character of an action to enforce the statutory remedy, or what it has said upon the nature of the stockholders' obligation, and whether it was several or joint, definite or adjustable according to a proportion. The germ of the present statutes of Kansas is found in the Territorial laws of 1855. The entire body of statutes which were enacted at that session was afterwards repealed, and statutory provisions in regard to the individual lability of stockholders seem to have been passed with respect to particular classes of corporations, and not to have been reproduced in a condensed form, until the revision and codification of 1868.

The first judicial decision of Kansas in regard to the individual liability of stockholders was upon the proper construction of Section 14, Chapter 31, of the Laws of 1863, in regard to the incorporation of insurance companies, which was as follows: "The stockholders of any company organized under this act shall, to the amount of stock by them held, be jointly and severally liable for all debts and responsibilities of the company." The Supreme Court of Kansas in Grund vs. Tucker, 5 Kan., 70, held that "under this statute a creditor may maintain an action at law against one or more stockholders in an insurance company organized under the act of 1863, to recover a debt due by the corporation." The Court thus anticipated the decision in Flash vs. Conn, regarded "each stockholder as individually liable for the debts of the company to an amount equal to the amount of his stock," rejected the idea of a proportionate liability or *pro rata* distribution of debts among stockholders, and consequently rejected the idea that the creditor's remedy must be in equity. In Hentig vs. James, 22 Kan., 326, the Kansas Court, in discussing the mode of procedure under Section 32, said that the creditor had two modes, either by the issuance of an execution against the stockholder, or by an action to charge him with the amount of judgment against the corporation, but said noth-

ing either in favor of or against the exclusive jurisdiction of the Kansas Court over the second mode of procedure.

In Howell vs. Mangelsdorf, 33 Kan., 194, the question of the transitoriness of the action at law was closely touched. A creditor had obtained an unsatisfied Kansas judgment against a Kansas corporation, had given notice to a non-resident stockholder who was sought to be charged and had moved the Court in which judgment was rendered, to order execution to issue against such non-resident. The question of the power of the trial Court to grant such motion came before the Supreme Court, which said that the first mode of procedure was not applicable to a non-resident stockholder, and that the second mode was "an ordinary action to be instituted wherever personal jurisdiction of the stockholder can be acquired," and further says that the ruling "does not deprive a creditor of a remedy against the stockholder residing in another State and upon whom service cannot be obtained here." "While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory," citing Flash vs. Conn, *supra*. It is true that this language is *obiter* in the sense that it is not absolutely necessary to the decision of the question before the Court, which was, whether by notice to a non-resident, the Kansas Court could order execution to issue against him; but it clearly stated the theory of the Court respecting the nature of the statutory remedy and the way in which it is to be worked out, and in a certain sense was not *obiter*, because it answered the argument that the liability of non-resident stockholders must be enforced by notice and the levy of an execution, or was not enforceable, and that, therefore, in many instances the creditors were without remedy.

Inasmuch as the answer to the question in regard to the transitoriness of the action is much aided by the fact that the remedy of the statute is several and individual and that the liability of the stockholder is a definite and fixed one, the next decision of the highest Kansas Court in Abbey vs. Dry Goods Co., 44 Kan., 415, is important. The case was under Section 44 and the complaint joined several stockholders as defendants, against whom several judgments were recovered, the aggregate of which amounted to the debt of the creditor against the corporation. The Court held that the liability of the stockholders to creditors under this section was not joint, but that each must be sued separately. The statute was in substance a copy of the Missouri statute in regard to stockholders' liability, and

the decision of the Missouri Court of Appeals upon the same subject (Perry vs. Turner, 55 Missouri, 418) and the decisions in Bank of Poughkeepsie vs. Abbotson, 24 Wend., 473, and Paine vs. Stewart, 33 Conn., 516, upon analogous statutes, are to the same effect.

The drift and tendency of the Kansas decisions, other than the one in the Howell case, in regard to the character of the stockholders' liability and of the creditors' remedy under Section 32, are manifest. The means which the statutes provided to enforce the individual constitutional liability determined and fixed the extent of the amount which must be paid by each stockholder individually, and which in no manner depended upon what any other stockholder could or ought to pay. As the statute was not penal, it is not important whether the liability is called statutory or one based upon contract. It is statutory because it did not exist at common law, and it is contractual because "every one who becomes a member of the company by subscribing to its stock, assumes this liability." (Flash vs. Conn., *supra.)* Section 32 has thus by the decision of the State Court, the *indicia* of a transitory action, and although these *indicia* might be overcome by a manifest intent of the legislature that the action should be local, yet when their intent has been interpreted by the highest court of their State, as in the Howell case, *supra*, we are not disposed to read into the statute another intent, unless such a construction is demanded. In our opinion another construction is not called for, but the legislature intended that the action against a non-resident stockholder was not necessarily to be under the jurisdiction of the courts of Kansas. Two modes of procedure were provided—one of a summary character which could be used in the case of resident stockholders, but which was useless against non-residents, and, if no means had been provided to make the liability of non-resident stockholders effective, creditors might in many instances lose entirely the benefit of the constitutional provision for their protection. The second mode was therefore provided of a transitory character, and the amount of the liability was made definite and certain, so that each stockholder could be severally sued.

There is more color for the conclusion that the action under Section 44 is local, because any stockholder who has paid a judgment against himself may sue the body of the stockholders and obtain contribution from them, and this part of the proceedings looks eventually towards a proportionate division among them. It

does not necessarily follow that the original judgment must have been obtained in Kansas. However this may be, we are satisfied that the proceeding against a stockholder under Section 32 is transitory.

It is said that this construction has not been sustained by the highest courts of the States of Massachusetts, Illinois and New York. It is true that in the Bank of North America vs. Rindge, 154 Mass., 203, which was a suit in Massachusetts to enforce the provisions of Section 32 against a Massachusetts stockholder, the question of the construction of the statute was attempted to be raised, but it is also true that the attempt was not successful. The defendant demurred to the sufficiency of the cause of action as stated in the declaration, but the Court was unable to decide whether the statute authorized an action in another State, for the "declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statutory or rest in judicial decisions. We are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the Courts of that State. But we must take the case as the parties present it to us." But in the Hancock Bank vs. Ellis, 166 Mass., 414, the pleader was more careful, and upon demurrer to a declaration upon the same statute against a Massachusetts stockholder the Court said: "A declaration which sets forth that according to the law of Kansas the defendant stockholder of a corporation organized under the laws of that State is liable to a judgment creditor of the corporation as upon a contract, which is suable anywhere, is good;" and, further, that "jurisdiction exists here (in Massachusetts) to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration." It thus appears that the Courts of Massachusetts have not yet stated their own opinion upon the statute in question. In Fowler vs. Lamson, 146 Illinois, 472, the plaintiff had recovered a judgment against a Kansas corporation before the Superior Court for Cook County, Illinois, an execution had been issued upon that judgment, which was returned unsatisfied, and the plaintiff then brought a bill in equity in the Courts of Cook County against stockholders to recover the amount of the judgment.

This bill was dismissed upon the ground that the Kansas statute was local. In Tuttle vs. National Bank of the Republic, 161 Illinois, 497, the question upon the Kansas statute came before

the Court, as it is presented here, and it was held that an action to carry this statute into effect would not lie in another State, three of the seven Judges dissenting.

In Marshall vs. Sherman, 148 N. Y., 9, the question arose upon the defendant's demurrer to the sufficiency of the complaint and because all the necessary parties to the action were not included. The constitution and statutes of Kansas were fully set out in the complaint, but the Judge who spoke for the Court remarked that there was no allegation as to the meaning or effect of the statutes or of the constitutional provision under the adjudication of the Court of Kansas, and that therefore the Court was obliged to construe them by itself. Among the various suggestions which were given in favor of sustaining the demurrer, the Court was of the opinion that the statutes provide for a special and peculiar remedy under the laws of Kansas. The Kansas decisions were not referred to in the opinion.

It is well understood that the tendency of the decisions in the State Courts has been to avoid taking jurisdiction of suits to enforce the liability of stockholders in a foreign corporation under the statutes of a foreign State, because, in the language of the Court (Rindge case, *supra*), the suit is one "which involves the relation between it (the foreign corporation) and its stockholders, and in which complete justice only can be done by the Courts of the jurisdiction where the corporation was created." But when the statutory remedy is one which does not involve any relation between stockholder and corporation, but touches only the liability of the stockholder to creditors (Guerney vs. Moore, 131 Missouri, 650), the argument is simply one against the expediency of the statute.

The decisions in the Federal Courts which affirm the jurisdiction of Federal Courts in other States to enforce this particular statute of Kansas are Bank of North America vs. Rindge, 57 Fed. Rep., 279; Rhodes vs. U. S. National Bank, 66 Fed. Rep., 512; McVickar vs. Jones, 70 Fed. Rep., 754. Decisions in addition to those already cited, in favor of jurisdiction of foreign Courts of foreign States to enforce similar or analogous State statutes, are Paine vs. Stewart, 33 Conn., 516; Cuykendall vs. Miles, 10 Fed. Rep., 342; Auer vs. Lombard, 72 Fed. Rep., 209.

The technical points which were made by the plaintiff in error are without solidity. It is said that the Kansas Court did not acquire jurisdiction to render judg-

ment against the corporation, because the cashier made a voluntary appearance and waived the issuance of process at the commencement of the suit in 1895, when no business had been done by the bank after its insolvency on December 15, 1890. But an attorney at law appeared, filed an answer to which the plaintiff replied and the presumptions are in favor of the regularity of the judgment. It was for the defendant to show that it was collusive or that the attorney was an intruder (Tenney vs. Townsend, 9 Blatchf., 274). It is next said that there was no competent evidence of the change of name of the corporation. The minutes of the proceedings were taken with him by the president "when he left" in May or June, 1889, and some secondary evidence was given of their contents, when perhaps an insufficient foundation had been laid for it. But the statutes of Kansas provide that a corporation can change its name, and Section 12 of Chapter 23 of the general statutes of 1869 provides as follows: "Such change of name * * * shall take effect and be enforced from the date at which the president or secretary of the corporation shall file with the Secretary of State an affidavit setting forth the name adopted, * * * together with the date at which such changes was voted by the stockholders of such corporation." A properly authenticated copy of the original certificate filed in the office of the Secretary of State was produced and was certainly sufficient proof of the change of name, until its truthfulness had been successfully attacked.

The judgment of the Circuit Court is affirmed with costs.

WILLIAM B. HORNBLOWER and HOWARD A. TAYLOR, for the plaintiff (defendant in error).

JOSEPH H. CHOATE and WM. G. WILSON, for the defendant (plaintiff in error).

[ENDORSED:] U. S. Circuit Court of Appeals, for the Second Circuit.—National Bank of Oxford vs. George L. Whitman. Opinion, SHIPMAN, C. J.—United States Circuit Court of Appeals, Second Circuit. Filed Jul. 21, 1897, William Parkin, Clerk.

SEVENTH. A certified copy of the entire record of said case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as part of this application, in conformity with Rule 37 of this Honorable Court, relative to cases from Circuit Courts of Appeals.

EIGHTH. Your petitioner is advised and believes that the said decision and judgment of the said United States Court of Appeals in the said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said act.

NINTH. The issues presented the questions, among others, of the nature and extent of the individual liability of a stockholder in a Kansas corporation for the debts of the corporation, and the power of the legislature of Kansas to establish new forms of procedure for courts outside the territorial limits of that State.

It was maintained on behalf of the defendant that the liability was purely statutory—*Morley vs. Thayer*, 3 Fed., 739; *Wells vs. Robb*, 43 Kan., 201; that the statute contained no declaration whatever of general liability, and whatever liability it created was an inference from the remedy which it provided; and that, as was said in *Pollard vs. Bailey*, 20 Wall., 520, "the liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed."

The present case was clearly one falling within this rule. The Kansas statute did not create a general liability without a remedy, so as to permit the enforcement of such liability by an appropriate common-law action; but, on the contrary, the provision for the liability is not only coupled with a provision for a special remedy, but exists solely by virtue of the provision for a special remedy.

The special remedy is twofold. After judgment has been recovered against the Kansas corporation, and execution thereon has been returned unsatisfied, then the Court may, on notice, make an order that execution on the same judgment be issued against any of the stockholders "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon;" "or the plaintiff in the execution may proceed

by action to charge the stockholders with the amount of his judgment."

The present action rests on this auhoritty only. It is an action to charge George L. Whitman, as a stockholder of the Arkansas City Investment Company, with the amount of the judgment recovered by the National Bank of Oxford against the Arkansas City Investment Company.

It was maintained on behalf of defendant that such a remedy, being purely a creation of the Kansas statute, could only be reesortd to within the territorial limits of the State of Kansas; that it was unknown to the common law and unknown to the Circuit Court of the United States for the Southern District of New York, and that it was not competent for the legislature of Kansas to prescribe new remedies to be administered by Courts without the State of Kansas.

This is the doctrine substantially held by the highest courts of three of the States: *Bank of North America vs. Pindge*, 154 Mass., 203; *Marshall vs. Sherman*, 148 N. Y., 9; *Fowler vs. Samson*, 146 Ill., 472; *Tuttle vs. Nat. Bank of Republic*, 161 Ill., 497.

TENTH. While it is true, as a general rule, that the courts of the United States will follow the construction which the highest courts of the several States have put upon the statutes of their respective States, this general rule must be taken with two qualifications to which it is essential that full recognition should be given in the consideration of the questions here presented. These qualifications are:

1. Such construction must form part of an actual decision by the State Court of an issue presented for decision by the case before it.

2. The issue presented must be of such character that the State Court is authorized to pass final and authoritative judgment upon it.

No one will question these propositions in the abstract. If the question upon which the State Court assumes to pass judgment is not a question presented by the case before it, or is a question which it is not within the power of the State Court to determine, the action of the Court is equally *coram non judice*.

Applying this to the present case, we find:

1. The decision of the Circuit Court of Appeals is founded

upon the assumed decision of the Supreme Court of Kansas in the case of *Howell vs. Mangelsdorf*, 33 Kan., 194, wherein that Court used the following language: "This rule does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another State, and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory and may be brought in any court of general jurisdiction in the State, where personal service can be made on the stockholder." But, in fact, this language was no part of the decision of the matter before the Supreme Court of Kansas, and was a mere *dictum*.

It is well settled in the rulings of this Court, as stated in *Carroll vs. Carroll*, 16 Howard, 286, by Mr. Justice CURTIS: "If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so there must have been an application of judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And, therefore, this Court and other courts organized under the common law has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens vs. The State of Virginia*, 6 Wheat., 399, this Court was much impressed with some portion of its opinion in the case of *Marbury vs. Madison*. And Mr. Chief-Justice MARSHALL said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be received, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent, other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *ex parte Christie*, 3 How., 292, and *Jenness et al. versus Peck*, 7 How., 612, are an illustration of the rule that any opinion

given here or elsewhere cannot be relied on as a binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

In *Howell vs. Mangelsdorf*, the plaintiff had obtained a judgment in the Kansas Court against the Kansas corporation, and had then resorted to the first of the two alternative remedies provided by the Kansas statute—that is, to a motion for an order that an execution issue upon that judgment against an individual stockholder of the Kansas corporation. The notice of the motion was served upon the stockholder outside the territorial limits of the State of Kansas; and the sole question presented was, whether such service without the State conferred jurisdiction upon the Kansas Court to make the order for the issue of execution against the stockholder. The Court decided the question thus presented, by holding that service of notice without the State did not confer upon it jurisdiction to order the execution, and denied the motion on the ground of want of jurisdiction to grant it.

And that was all that the Kansas Court could decide, upon the question before it. If, by any possibility, the question whether the second of the two alternative remedies provided by the Kansas statute—that is, an action by the plaintiff in the execution to charge the stockholders with the amount of his judgment—was maintainable without the State of Kansas, could have come before the Kansas Court, it certainly was not then before the Kansas Court, for no such action had been attempted. The sole question was whether service of notice of motion for execution without the State conferred jurisdiction upon the Kansas Court, and that Court held that it did not. Having decided itself to be without jurisdiction, the Kansas Court had no possible jurisdiction to go on and determine other questions which were not before it.

And yet it is upon the assumed decision of the Kansas Court, as to the jurisdiction of Courts of other States, in actions which might be brought therein to charge stockholders there with Kansas judgments against their corporations, that all the authority for the present determination of the CircuitCourt of Appeals rests. The cases of *Bank of North America vs. Rindge*, 57 Fed., 279; *Rhodes vs. United States National Bank*, 66 Fed., 512; *McVicker vs. Jones*, 70 Fed., 574, which are put forward as precedents for the decision in the present case, rest only on the assumed authority of *Howell vs. Mangelsdorf* as being the authoritative decision of the Kansas Court upon the precise question presented here.

II. If the question had been presented to the Kansas Court, it could not have been competent for that Court to have determined what jurisdiction the Courts outside of Kansas might entertain to enforce the remedy of an action by the plaintiff in the execution to charge the stockholders with the amount of his judgment.

It is a fundamental proposition that each court is the judge of its own jurisdiction. Any other rule would lead to chaos.

If the Kansas Legislature may pass statutes, and the Kansas courts may decide, as general principles of law, binding upon parties not before them, that the Kansas statutes are to be enforced by courts without the State of Kansas, whether State courts or Federal courts, then the Legislature of Kansas can, in effect, legislate for the whole of the United States, and the Legislature of every other State can do the same. New remedies, new forms of action may be devised, and while the State courts may decline to exercise the jurisdiction, the courts of the United States are bound to do so; and the rights of each citizen will depend, not on well-settled principles and forms of procedure, but on the accident of citizenship in the same State, or diversity of citizenship, between the plaintiff and the defendant.

The present case is a forcible illustration. Your petitioner cannot be sued upon the cause of action here asserted, in any action brought in the courts of New York, because those courts do not recognize the power of the Legislature and courts of Kansas to impose upon him without that State the form of remedy sought to be enforced. But he is exposed to liability upon the same cause of action in the courts of the United States whenever the plaintiff is fortunate enough to be a citizen of another State than New York. If your petitioner were a citizen of the State of Pennsylvania, then he would be secure against any suit which the National Bank of Oxford might bring, but would be exposed to attack by a citizen of New York, who cannot attack him now.

The courts of Kansas have no authority to determine the powers and functions of the courts outside the limits of Kansas, and cannot by any decision of theirs, under the guise of construing a State statute, confer or impose jurisdiction without those limits, any more than the Legislature of Kansas could do the same thing by statutes containing an express declaration to the like effect.

If the Kansas statute had said upon its face, and in express terms, that any plaintiff in a Kansas judgment and execution

against a Kansas corporation might maintain an action in any court of any other State, or any court of the United States wherever situated, to charge a stockholder with the judgment in Kansas against the corporation, it can hardly be that such an enactment would be held binding outside the State of Kansas. The Circuit Court of the United States for the Southern District of New York might well say that it did not derive its jurisdiction from the Legislature of Kansas, but that its forms of remedy and procedure were derived from the Acts of Congress, among which is that instructing it to follow the common law practice and procedure of the State of New York. And yet here we have the same Circuit Court of the United States for the Southern District of New York entertaining a novel jurisdiction and enforcing a new form of action in obedience to a *dictum* of a Kansas Court which has assumed to declare that the Kansas Legislature intended as much in and by a statute which says nothing of the kind.

The form of action is one unknown to the common law. No such action is known to the common law as one to charge a stockholder individually with a judgment against his corporation. The remedy is novel; under the authority of *Pollard vs. Bailey (supra)*, the remedy is exclusive; and it is the remedy which has been resorted to and assumed to be enforced in the present case; an action to charge B with a judgment against A, recovered in a foreign jurisdiction in a suit to which B was a stranger.

ELEVENTH. Your petitioner is informed and believes that the questions here presented are of great importance and of wide reaching effect; that the decisions of the highest courts of several of the States and especially those of Massachusetts, New York and Illinois, are in direct conflict with that of the Circuit Court of Appeals for the Second Circuit, which your petitioner now asks to have reviewed; and that a very large number of actions, involving in the aggregate very large sums of money, and presenting the same questions here presented, are now pending in the courts of various States and in various courts of the United States; and that it is matter of great public interest and importance that such question should be heard and passed upon and determined by your Honorable Court, to the end that the law controlling the same and the constitutional principles involved should be finally settled and established.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled George L. Whitman, plaintiff in error, against The National Bank of Oxford, to the end that the said case may be reviewed and determined by this Court, as provided in Section 6 of the Act af Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity with the said act, and that the said determination of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.

GEORGE L. WHITMAN.

JOSEPH H. CHOATE,
WILLIAM G. WILSON,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, } ss. :
City and County of New York, }

GEORGE L. WHITMAN, being duly sworn, says that he is the petitioner named in the foregoing petition, which has been signed by him; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

GEORGE L. WHITMAN.

Subscribed and sworn to before me this 8th day of October, A. D. 1897.

WM. E. ZABRISKIE,
Notary Public (1),
N. Y. Co.

[SEAL.]

No. 452. XXX. 27. S.C.

Brief of Choate & Wilson for Pet.

Filed Oct. 16, 1897.

IN THE

Supreme Court of the United States.

Office Supreme Court, U. S.
FILED
OCT 16 1897
JAMES H. McKENNEY
CLERK

OCTOBER TERM, 1897.

GEORGE L. WHITMAN,
Petitioner,

vs.

NATIONAL BANK OF OXFORD,
Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

JOSEPH H. CHOATE,
WILLIAM G. WILSON,
Of Counsel for Petitioner.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.—*Ex Parte* GEORGE L. WHITMAN, Petitioner.

Petition for writ of *certiorari* requiring the Circuit Court of Appeals for the Second Circuit to certify to the Supreme Court, for its review and determination, the case of George L. Whitman, plaintiff in error, versus National Bank of Oxford, defendant in error.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of George L. Whitman, plaintiff in error, respectfully shows to this Honorable Court as follows:

FIRST. Your petitioner is a citizen of the United States, residing in the City and State of New York.

SECOND. On or about May 29, 1895, the National Bank of Oxford brought an action in the Circuit Court of the United States, for the Southern District of New York, against your petitioner upon the cause of action hereinafter stated; and in its complaint therein said National Bank of Oxford alleged that your petitioner was a stockholder of a certain corporation of the State of Kansas known as the Arkansas City Investment Company, and was, as such stockholder, liable to the plaintiff, said National Bank of Oxford, for the amount of a judgment alleged to have been theretofore recovered by said National Bank of Oxford against the said Kansas corporation in a court of the State of Kansas; and the relief demanded in said action against your petitioner was a judgment against him for the amount of the said judgment of the said Kansas Court against said Kansas corporation, with interest thereon and costs. Said complaint set forth said provisions of the Constitution and Statutes of the State of Kansas as fixing the liability of your petitioner to action

and recovery thereunder in said Circuit Court of the United States for the Southern District of New York.

THIRD. Your petitioner answered the said complaint and among other defenses thereto maintained in his said answer that said Circuit Court of the United States for the Southern District of New York had not jurisdiction of the subject of the action or of the subject of the cause of action alleged in said complaint, and that the said complaint did not state facts sufficient to constitute a cause of action.

FOURTH. Thereafter the issues raised by said complaint and answer were brought to trial before the Honorable HOYT H. WHEELER and a jury in said Circuit Court of the United States, on June 10, 1896; and thereupon, at the close of such trial, after the taking of oral and documentary evidence, both parties having rested, a verdict was directed in favor of said National Bank of Oxford against your petitioner, for the amount of said Kansas judgment against said Kansas corporation, and interest thereon and costs of said action in the Circuit Court of the United States, to which direction and action of the Court said petitioner duly excepted.

FIFTH. Thereafter your petitioner made a motion to set aside the said verdict, which motion was denied, your petitioner duly excepting to such denial, and judgment was thereupon entered in favor of said National Bank of Oxford against your petitioner for $4,205.48, with interest thereon at the rate of ten per cent. per annum.

SIXTH. Thereafter your petitioner made up his bill of exceptions to review such judgment and proceedings, and took out a writ of error to review the same; and such writ of error was thereafter brought before the United States Circuit Court of Appeals for the Second Circuit, and argument having been had thereon said Circuit Court of Appeals thereafter rendered a decision for the affirmance of the judgment of said United States Circuit Court, which decision is as follows:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NATIONAL BANK OF OXFORD

v.

GEORGE L. WHITMAN.

The Constitution of the State of Kansas provided, prior to the year 1866, and still provides, in Section 2 of Article XII., as follows:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law, but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

Section 32 of Chapter 23 of the General Statutes of Kansas of 1868, Section 40 of the same chapter, as amended in 1883, and Section 44 of the same chapter, which are still the statutes of the State, provided as follows:

"SECTION 32. If an execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the Court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such Court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"SECTION 40 (as amended): A corporation is dissolved, first, by the expiration of the time limited in its charter; second, by a judgment of dissolution rendered by a court of competent jurisdiction; but any such corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year, or that any corporation so suspended from business shall, for three months after the passage of this act, fail to resume its usual and ordinary business."

"SECTION 44: If any corporation created under this or any general statute of this State, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation to such suit; and, if judgment be rendered and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively, and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of the deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

The Arkansas City Bank was formed in 1886, under the laws of the State of Kansas, to do a banking and real estate business with a capital of $20,000, divided into 2,000 shares of $100 each, and was located in Arkansas City in said State. The original stockholders, their residences and the number of the shares of each stockholder were as follows:

George L. Whitman, New York City	1,000 shares.
Samuel Newell, " " "	649 "
James L. Huey, Arkansas City	349 "
Mary L. Newell, New York City	1 "
Mary E. Huey, " " "	1 "

In 1889 the name of the bank was changed and became the Arkansas City Investment Company. In December, 1890, it made

a general assignment for the benefit of its creditors, and from that time completely suspended its business, and thereafter, at the expiration of one year, was deemed to be dissolved under the provisions of Section 40 for the purpose of enabling its creditors to sue its stockholders. About four months before its failure it endorsed and guaranteed for value two promissory notes, together amounting to $4,875, which were discounted by the plaintiff the National Bank of Oxford, located in Pennsylvania. The assignee made payments upon these notes from time to time; but, in 1895, the plaintiff duly obtained judgment against the bank, in a State Court of Kansas, for the sum of $3,468.30, the bank having appeared and having made answer to the complaint. An execution upon this judgment was returned to court wholly unsatisfied, and it appeared that the bank had at that time no assets or property. The plaintiff thereupon brought an action at law in the Circuit Court for the Southern District of New York against the defendant George L. Whitman, being the owner of one thousand shares of the stock of this bank, to recover from him the amount due to the plaintiff from said bank. The complaint in the action alleged all the foregoing facts. The defendant had not, theretofore, been subjected to any liability as a stockholder of the bank.

At the close of the trial of this suit before a jury, each party moved for the direction of a verdict in its favor. The Court directed a verdict in favor of the plaintiff for the amount of the Kansas judgment, with interest.

To reverse the judgment entered upon this verdict a writ of error was brought. The principal question presented by the assignments of error was as to the character of the remedy provided by the Kansas statutes against a stockholder of an insolvent corporation; whether it was a special, peculiar and local remedy created by the statute and without force and not capable of being enforced outside of the limits of the State of Kansas.

SHIPMAN, C. J.:

It will be observed, that the complaint contains the averments which are required either by Section 32 or Section 44, and seeks to enforce an alleged liability of the defendant, whether he is to be charged with the amount of the Kansas judgment or with the amount of the debt due to the plaintiff from the corporation, and it is to be further noticed that not only the fact of the judgment was proved, but that also all the facts upon which the judgment was

based, such as the guaranty, the discount and the nonpayment, were proved, so that the question which is often raised as to the force and effect of the original judgment and how much it establishes against the stockholder is immaterial. The plaintiff has proved all the facts that are to be proved, whether the judgment conclusively established against the stockholders the indebtedness of the bank, or was only *prima facie* evidence of it, or was no evidence of the indebtedness, but was merely a condition precedent to a suit against the stockholder.

The main question in the case, whether a suit to enforce the liability declared by the Constitution of Kansas and provided by its statutes, was transitory in its character and could be brought by an action at law in a court of another State against a single stockholder who was a resident of such State, has already been stated.

It is to be premised, as was clearly shown by Justice CLIFFORD in Morley vs. Thayer, 3 Fed. Rep., 739, with respect to this particular constitutional provision, that it is not self-executing in its character, and that statutory legislation was therefore required to carry it into effect (Grover vs. Slaughter, 15 Pet., 449; Wells vs. Robb, 43 Kan., 201). It is also to be premised, as stated in Pollard vs. Baily, 20 Wall., 520, and reaffirmed in Fourth National Bank vs. Francklyn, 120 U. S., 747, that the statutory remedy is exclusive. "A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But, when the provision for a liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

Two other decisions have been recently given by the Supreme Court which do not undertake to construe this class of statutes, but which are important because they declare the conclusion which must naturally follow, if the plaintiff's construction has been established by the highest Court of Kansas, and because they show the particulars in this class of statutes, which the Supreme Court regards as especially significant upon the question of construction.

The case of Flash vs. Conn, 109 U. S., 371, was based upon a provision in a general act of the State of New York for the formation of corporations, that all the stockholders of every company incorporated under it shall be severally individually liable to creditors of the company until the whole amount of the capital stock shall be paid in and certified. The Court, after saying that great, if not conclusive, weight must be given to the construction which the

highest Court of New York had placed upon the statute, and that, following such construction, the liability was in contract, said that "it can be enforced by an action sounding in contract against a stockholder found in another State," and that a resort to equity was not necessary, but an action at law was adequate. Upon the last point the Court said: "Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the cases of Pollard vs. Bailey, 20 Ward, 520; Terry vs. Tubman, 92 U. S., 156, to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders. This, the Court held, could only be done by a suit in equity.

"But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company, and sued out an execution thereon which has been returned unsatisfied, may sue any stockholder, and no other creditor can."

This decision was not novel in its character, although its doctrine had not been universally controlling in the State Courts; but, in Huntington vs. Attrill, 146 U. S., 657, the Supreme Court stated its position in regard to the duty of a Court of one State to enforce a statute of another State, which was penal in the popular sense, and a position which was not in accordanee with the obiter remarks of the Justice who delivered the opinion of the Court in Steam Engine Co. vs. Hubbard, 101 U. S., 188, 192. The Huntington case grew out of a statute of the State of New York, which made the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock, liable for all its debts, and the question was whether such a statute was so penal in its character that it could not be enforced in the courts of another State. The Court said: "As the statute imposes a burdensome liability on the officers for their wrongful act it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the

creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground on principle for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country."

It becomes, therefore, of prime importance to ascertain what the highest Court of Kansas has said in regard to the transitory character of an action to enforce the statutory remedy, or what it has said upon the nature of the stockholders' obligation, and whether it was several or joint, definite or adjustable according to a proportion. The germ of the present statutes of Kansas is found in the Territorial laws of 1855. The entire body of statutes which were enacted at that session was afterwards repealed, and statutory provisions in regard to the individual lability of stockholders seem to have been passed with respect to particular classes of corporations, and not to have been reproduced in a condensed form, until the revision and codification of 1868.

The first judicial decision of Kansas in regard to the individual liability of stockholders was upon the proper construction of Section 14, Chapter 31, of the Laws of 1863, in regard to the incorporation of insurance companies, which was as follows: "The stockholders of any company organized under this act shall, to the amount of stock by them held, be jointly and severally liable for all debts and responsibilities of the company." The Supreme Court of Kansas in Grund vs. Tucker, 5 Kan., 70, held that "under this statute a creditor may maintain an action at law against one or more stockholders in an insurance company organized under the act of 1863, to recover a debt due by the corporation." The Court thus anticipated the decision in Flash vs. Conn, regarded "each stockholder as individually liable for the debts of the company to an amount equal to the amount of his stock," rejected the idea of a proportionate liability or *pro rata* distribution of debts among stockholders, and consequently rejected the idea that the creditor's remedy must be in equity. In Hentig vs. James, 22 Kan., 326, the Kansas Court, in discussing the mode of procedure under Section 32, said that the creditor had two modes, either by the issuance of an execution against the stockholder, or by an action to charge him with the amount of judgment against the corporation, but said noth-

ing either in favor of or against the exclusive jurisdiction of the Kansas Court over the second mode of procedure.

In Howell vs. Mangelsdorf, 33 Kan., 194, the question of the transitoriness of the action at law was closely touched. A creditor had obtained an unsatisfied Kansas judgment against a Kansas corporation, had given notice to a non-resident stockholder who was sought to be charged and had moved the Court in which judgment was rendered, to order execution to issue against such non-resident. The question of the power of the trial Court to grant such motion came before the Supreme Court, which said that the first mode of procedure was not applicable to a non-resident stockholder, and that the second mode was "an ordinary action to be instituted wherever personal jurisdiction of the stockholder can be acquired," and further says that the ruling "does not deprive a creditor of a remedy against the stockholder residing in another State and upon whom service cannot be obtained here." "While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory," citing Flash vs. Conn, *supra*. It is true that this language is *obiter* in the sense that it is not absolutely necessary to the decision of the question before the Court, which was, whether by notice to a non-resident, the Kansas Court could order execution to issue against him; but it clearly stated the theory of the Court respecting the nature of the statutory remedy and the way in which it is to be worked out, and in a certain sense was not *obiter*, because it answered the argument that the liability of non-resident stockholders must be enforced by notice and the levy of an execution, or was not enforceable, and that, therefore, in many instances the creditors were without remedy.

Inasmuch as the answer to the question in regard to the transitoriness of the action is much aided by the fact that the remedy of the statute is several and individual and that the liability of the stockholder is a definite and fixed one, the next decision of the highest Kansas Court in Abbey vs. Dry Goods Co., 44 Kan., 415, is important. The case was under Section 44 and the complaint joined several stockholders as defendants, against whom several judgments were recovered, the aggregate of which amounted to the debt of the creditor against the corporation. The Court held that the liability of the stockholders to creditors under this section was not joint, but that each must be sued separately. The statute was in substance a copy of the Missouri statute in regard to stockholders' liability, and

the decision of the Missouri Court of Appeals upon the same subject (Perry vs. Turner, 55 Missouri, 418) and the decisions in Bank of Poughkeepsie vs. Abbotson, 24 Wend., 473, and Paine vs. Stewart, 33 Conn., 516, upon analogous statutes, are to the same effect.

The drift and tendency of the Kansas decisions, other than the one in the Howell case, in regard to the character of the stockholders' liability and of the creditors' remedy under Section 32, are manifest. The means which the statutes provided to enforce the individual constitutional liability determined and fixed the extent of the amount which must be paid by each stockholder individually, and which in no manner depended upon what any other stockholder could or ought to pay. As the statute was not penal, it is not important whether the liability is called statutory or one based upon contract. It is statutory because it did not exist at common law, and it is contractual because "every one who becomes a member of the company by subscribing to its stock, assumes this liability." (Flash vs. Conn., *supra.)* Section 32 has thus by the decision of the State Court, the *indicia* of a transitory action, and although these *indicia* might be overcome by a manifest intent of the legislature that the action should be local, yet when their intent has been interpreted by the highest court of their State, as in the Howell case, *supra*, we are not disposed to read into the statute another intent, unless such a construction is demanded. In our opinion another construction is not called for, but the legislature intended that the action against a non-resident stockholder was not necessarily to be under the jurisdiction of the courts of Kansas. Two modes of procedure were provided—one of a summary character which could be used in the case of resident stockholders, but which was useless against non-residents, and, if no means had been provided to make the liability of non-resident stockholders effective, creditors might in many instances lose entirely the benefit of the constitutional provision for their protection. The second mode was therefore provided of a transitory character, and the amount of the liability was made definite and certain, so that each stockholder could be severally sued.

There is more color for the conclusion that the action under Section 44 is local, because any stockholder who has paid a judgment against himself may sue the body of the stockholders and obtain contribution from them, and this part of the proceedings looks eventually towards a proportionate division among them. It

does not necessarily follow that the original judgment must have been obtained in Kansas. However this may be, we are satisfied that the proceeding against a stockholder under Section 32 is transitory.

It is said that this construction has not been sustained by the highest courts of the States of Massachusetts, Illinois and New York. It is true that in the Bank of North America vs. Rindge, 154 Mass., 203, which was a suit in Massachusetts to enforce the provisions of Section 32 against a Massachusetts stockholder, the question of the construction of the statute was attempted to be raised, but it is also true that the attempt was not successful. The defendant demurred to the sufficiency of the cause of action as stated in the declaration, but the Court was unable to decide whether the statute authorized an action in another State, for the "declaration does not in terms set forth any statute of Kansas, nor show to what extent the laws of Kansas above set forth are statutory or rest in judicial decisions. We are not at liberty to determine the case upon an examination of the statute of Kansas, with the assistance of any construction which may have been put upon it by the Courts of that State. But we must take the case as the parties present it to us." But in the Hancock Bank vs. Ellis, 166 Mass., 414, the pleader was more careful, and upon demurrer to a declaration upon the same statute against a Massachusetts stockholder the Court said: "A declaration which sets forth that according to the law of Kansas the defendant stockholder of a corporation organized under the laws of that State is liable to a judgment creditor of the corporation as upon a contract, which is suable anywhere, is good;" and, further, that "jurisdiction exists here (in Massachusetts) to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration." It thus appears that the Courts of Massachusetts have not yet stated their own opinion upon the statute in question. In Fowler vs. Lamson, 146 Illinois, 472, the plaintiff had recovered a judgment against a Kansas corporation before the Superior Court for Cook County, Illinois, an execution had been issued upon that judgment, which was returned unsatisfied, and the plaintiff then brought a bill in equity in the Courts of Cook County against stockholders to recover the amount of the judgment.

This bill was dismissed upon the ground that the Kansas statute was local. In Tuttle vs. National Bank of the Republic, 161 Illinois, 497, the question upon the Kansas statute came before

the Court, as it is presented here, and it was held that an action to carry this statute into effect would not lie in another State, three of the seven Judges dissenting.

In Marshall vs. Sherman, 148 N. Y., 9, the question arose upon the defendant's demurrer to the sufficiency of the complaint and because all the necessary parties to the action were not included. The constitution and statutes of Kansas were fully set out in the complaint, but the Judge who spoke for the Court remarked that there was no allegation as to the meaning or effect of the statutes or of the constitutional provision under the adjudication of the Court of Kansas, and that therefore the Court was obliged to construe them by itself. Among the various suggestions which were given in favor of sustaining the demurrer, the Court was of the opinion that the statutes provide for a special and peculiar remedy under the laws of Kansas. The Kansas decisions were not referred to in the opinion.

It is well understood that the tendency of the decisions in the State Courts has been to avoid taking jurisdiction of suits to enforce the liability of stockholders in a foreign corporation under the statutes of a foreign State, because, in the language of the Court (Rindge case, *supra*), the suit is one "which involves the relation between it (the foreign corporation) and its stockholders, and in which complete justice only can be done by the Courts of the jurisdiction where the corporation was created." But when the statutory remedy is one which does not involve any relation between stockholder and corporation, but touches only the liability of the stockholder to creditors (Guerney vs. Moore, 131 Missouri, 650), the argument is simply one against the expediency of the statute.

The decisions in the Federal Courts which affirm the jurisdiction of Federal Courts in other States to enforce this particular statute of Kansas are Bank of North America vs. Rindge, 57 Fed. Rep., 279; Rhodes vs. U. S. National Bank, 66 Fed. Rep., 512; McVickar vs. Jones, 70 Fed. Rep., 754. Decisions in addition to those already cited, in favor of jurisdiction of foreign Courts of foreign States to enforce similar or analogous State statutes, are Paine vs. Stewart, 33 Conn., 516; Cuykendall vs. Miles, 10 Fed. Rep., 342; Auer vs. Lombard, 72 Fed. Rep., 209.

The technical points which were made by the plaintiff in error are without solidity. It is said that the Kansas Court did not acquire jurisdiction to render judg-

ment against the corporation, because the cashier made a voluntary appearance and waived the issuance of process at the commencement of the suit in 1895, when no business had been done by the bank after its insolvency on December 15, 1890. But an attorney at law appeared, filed an answer to which the plaintiff replied and the presumptions are in favor of the regularity of the judgment. It was for the defendant to show that it was collusive or that the attorney was an intruder (Tenney vs. Townsend, 9 Blatchf., 274). It is next said that there was no competent evidence of the change of name of the corporation. The minutes of the proceedings were taken with him by the president "when he left" in May or June, 1889, and some secondary evidence was given of their contents, when perhaps an insufficient foundation had been laid for it. But the statutes of Kansas provide that a corporation can change its name, and Section 12 of Chapter 23 of the general statutes of 1869 provides as follows: "Such change of name * * * shall take effect and be enforced from the date at which the president or secretary of the corporation shall file with the Secretary of State an affidavit setting forth the name adopted, * * * together with the date at which such changes was voted by the stockholders of such corporation." A properly authenticated copy of the original certificate filed in the office of the Secretary of State was produced and was certainly sufficient proof of the change of name, until its truthfulness had been successfully attacked.

The judgment of the Circuit Court is affirmed with costs.

WILLIAM B. HORNBLOWER and HOWARD A. TAYLOR, for the plaintiff (defendant in error).

JOSEPH H. CHOATE and WM. G. WILSON, for the defendant (plaintiff in error).

[ENDORSED:] U. S. Circuit Court of Appeals, for the Second Circuit.—National Bank of Oxford vs. George L. Whitman. Opinion, SHIPMAN, C. J.—United States Circuit Court of Appeals, Second Circuit. Filed Jul. 21, 1897, William Parkin, Clerk.

SEVENTH. A certified copy of the entire record of said case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as part of this application, in conformity with Rule 37 of this Honorable Court, relative to cases from Circuit Courts of Appeals.

EIGHTH. Your petitioner is advised and believes that the said decision and judgment of the said United States Court of Appeals in the said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said act.

NINTH. The issues presented the questions, among others, of the nature and extent of the individual liability of a stockholder in a Kansas corporation for the debts of the corporation, and the power of the legislature of Kansas to establish new forms of procedure for courts outside the territorial limits of that State.

It was maintained on behalf of the defendant that the liability was purely statutory—*Morley vs. Thayer*, 3 Fed., 739; *Wells vs. Robb*, 43 Kan., 201; that the statute contained no declaration whatever of general liability, and whatever liability it created was an inference from the remedy which it provided; and that, as was said in *Pollard vs. Bailey*, 20 Wall., 520, "the liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed."

The present case was clearly one falling within this rule. The Kansas statute did not create a general liability without a remedy, so as to permit the enforcement of such liability by an appropriate common-law action; but, on the contrary, the provision for the liability is not only coupled with a provision for a special remedy, but exists solely by virtue of the provision for a special remedy.

The special remedy is twofold. After judgment has been recovered against the Kansas corporation, and execution thereon has been returned unsatisfied, then the Court may, on notice, make an order that execution on the same judgment be issued against any of the stockholders "to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon;" "or the plaintiff in the execution may proceed

by action to charge the stockholders with the amount of his judgment."

The present action rests on this authoritty only. It is an action to charge George L. Whitman, as a stockholder of the Arkansas City Investment Company, with the amount of the judgment recovered by the National Bank of Oxford against the Arkansas City Investment Company.

It was maintained on behalf of defendant that such a remedy, being purely a creation of the Kansas statute, could only be reesortd to within the territorial limits of the State of Kansas; that it was unknown to the common law and unknown to the Circuit Court of the United States for the Southern District of New York, and that it was not competent for the legislature of Kansas to prescribe new remedies to be administered by Courts without the State of Kansas.

This is the doctrine substantially held by the highest courts of three of the States : *Bank of North America vs. Rindge*, 154 Mass., 203 ; *Marshall vs. Sherman*, 148 N. Y., 9 ; *Fowler vs. Samson*, 146 Ill., 472 ; *Tuttle vs. Nat. Bank of Republic*, 161 Ill., 497.

TENTH. While it is true, as a general rule, that the courts of the United States will follow the construction which the highest courts of the several States have put upon the statutes of their respective States, this general rule must be taken with two qualifications to which it is essential that full recognition should be given in the consideration of the questions here presented. These qualifications are :

1. Such construction must form part of an actual decision by the State Court of an issue presented for decision by the case before it.

2. The issue presented must be of such character that the State Court is authorized to pass final and authoritative judgment upon it.

No one will question these propositions in the abstract. If the question upon which the State Court assumes to pass judgment is not a question presented by the case before it, or is a question which it is not within the power of the State Court to determine, the action of the Court is equally *coram non judice*.

Applying this to the present case, we find :

1. The decision of the Circuit Court of Appeals is founded

upon the assumed decision of the Supreme Court of Kansas in the case of *Howell vs. Mangelsdorf*, 33 Kan., 194, wherein that Court used the following language: "This rule does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another State, and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory and may be brought in any court of general jurisdiction in the State, where personal service can be made on the stockholder." But, in fact, this language was no part of the decision of the matter before the Supreme Court of Kansas, and was a mere *dictum*.

It is well settled in the rulings of this Court, as stated in *Carroll vs. Carroll*, 16 Howard, 286, by Mr. Justice CURTIS: "If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so there must have been an application of judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And, therefore, this Court and other courts organized under the common law has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens vs. The State of Virginia*, 6 Wheat., 399, this Court was much impressed with some portion of its opinion in the case of *Marbury vs. Madison*. And Mr. Chief-Justice MARSHALL said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be received, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent, other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of *ex parte Christie*, 3 How., 292, and *Jenness et al. versus Peck*, 7 How., 612, are an illustration of the rule that any opinion

given here or elsewhere cannot be relied on as a binding authority unless the case called for its expression. Its weight of reason must depend on what it contains."

In *Howell vs. Mangelsdorf*, the plaintiff had obtained a judgment in the Kansas Court against the Kansas corporation, and had then resorted to the first of the two alternative remedies provided by the Kansas statute—that is, to a motion for an order that an execution issue upon that judgment against an individual stockholder of the Kansas corporation. The notice of the motion was served upon the stockholder outside the territorial limits of the State of Kansas; and the sole question presented was, whether such service without the State conferred jurisdiction upon the Kansas Court to make the order for the issue of execution against the stockholder. The Court decided the question thus presented, by holding that service of notice without the State did not confer upon it jurisdiction to order the execution, and denied the motion on the ground of want of jurisdiction to grant it.

And that was all that the Kansas Court could decide, upon the question before it. If, by any possibility, the question whether the second of the two alternative remedies provided by the Kansas statute—that is, an action by the plaintiff in the execution to charge the stockholders with the amount of his judgment—was maintainable without the State of Kansas, could have come before the Kansas Court, it certainly was not then before the Kansas Court, for no such action had been attempted. The sole question was whether service of notice of motion for execution without the State conferred jurisdiction upon the Kansas Court, and that Court held that it did not. Having decided itself to be without jurisdiction, the Kansas Court had no possible jurisdiction to go on and determine other questions which were not before it.

And yet it is upon the assumed decision of the Kansas Court, as to the jurisdiction of Courts of other States, in actions which might be brought therein to charge stockholders there with Kansas judgments against their corporations, that all the authority for the present determination of the CircuitCourt of Appeals rests. The cases of *Bank of North America vs. Rindge*, 57 Fed., 279; *Rhodes vs. United States National Bank*, 66 Fed., 512; *McVicker vs. Jones*, 70 Fed., 574, which are put forward as precedents for the decision in the present case, rest only on the assumed authority of *Howell vs. Mangelsdorf* as being the authoritative decision of the Kansas Court upon the precise question presented here.

II. If the question had been presented to the Kansas Court, it could not have been competent for that Court to have determined what jurisdiction the Courts outside of Kansas might entertain to enforce the remedy of an action by the plaintiff in the execution to charge the stockholders with the amount of his judgment.

It is a fundamental proposition that each court is the judge of its own jurisdiction. Any other rule would lead to chaos.

If the Kansas Legislature may pass statutes, and the Kansas courts may decide, as general principles of law, binding upon parties not before them, that the Kansas statutes are to be enforced by courts without the State of Kansas, whether State courts or Federal courts, then the Legislature of Kansas can, in effect, legislate for the whole of the United States, and the Legislature of every other State can do the same. New remedies, new forms of action may be devised, and while the State courts may decline to exercise the jurisdiction, the courts of the United States are bound to do so; and the rights of each citizen will depend, not on well-settled principles and forms of procedure, but on the accident of citizenship in the same State, or diversity of citizenship, between the plaintiff and the defendant.

The present case is a forcible illustration. Your petitioner cannot be sued upon the cause of action here asserted, in any action brought in the courts of New York, because those courts do not recognize the power of the Legislature and courts of Kansas to impose upon him without that State the form of remedy sought to be enforced. But he is exposed to liability upon the same cause of action in the courts of the United States whenever the plaintiff is fortunate enough to be a citizen of another State than New York. If your petitioner were a citizen of the State of Pennsylvania, then he would be secure against any suit which the National Bank of Oxford might bring, but would be exposed to attack by a citizen of New York, who cannot attack him now.

The courts of Kansas have no authority to determine the powers and functions of the courts outside the limits of Kansas, and cannot by any decision of theirs, under the guise of construing a State statute, confer or impose jurisdiction without those limits, any more than the Legislature of Kansas could do the same thing by statutes containing an express declaration to the like effect.

If the Kansas statute had said upon its face, and in express terms, that any plaintiff in a Kansas judgment and execution

against a Kansas corporation might maintain an action in any court of any other State, or any court of the United States wherever situated, to charge a stockholder with the judgment in Kansas against the corporation, it can hardly be that such an enactment would be held binding outside the State of Kansas. The Circuit Court of the United States for the Southern District of New York might well say that it did not derive its jurisdiction from the Legislature of Kansas, but that its forms of remedy and procedure were derived from the Acts of Congress, among which is that instructing it to follow the common law practice and procedure of the State of New York. And yet here we have the same Circuit Court of the United States for the Southern District of New York entertaining a novel jurisdiction and enforcing a new form of action in obedience to a *dictum* of a Kansas Court which has assumed to declare that the Kansas Legislature intended as much in and by a statute which says nothing of the kind.

The form of action is one unknown to the common law. No such action is known to the common law as one to charge a stockholder individually with a judgment against his corporation. The remedy is novel; under the authority of *Pollard vs. Bailey (supra)*, the remedy is exclusive; and it is the remedy which has been resorted to and assumed to be enforced in the present case; an action to charge B with a judgment against A, recovered in a foreign jurisdiction in a suit to which B was a stranger.

ELEVENTH. Your petitioner is informed and believes that the questions here presented are of great importance and of wide reaching effect; that the decisions of the highest courts of several of the States and especially those of Massachusetts, New York and Illinois, are in direct conflict with that of the Circuit Court of Appeals for the Second Circuit, which your petitioner now asks to have reviewed; and that a very large number of actions, involving in the aggregate very large sums of money, and presenting the same questions here presented, are now pending in the courts of various States and in various courts of the United States; and that it is matter of great public interest and importance that such question should be heard and passed upon and determined by your Honorable Court, to the end that the law controlling the same and the constitutional principles involved should be finally settled and established.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled George L. Whitman, plaintiff in error, against The National Bank of Oxford, to the end that the said case may be reviewed and determined by this Court, as provided in Section 6 of the Act af Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity with the said act, and that the said determination of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.

GEORGE L. WHITMAN.

JOSEPH H. CHOATE,
WILLIAM G. WILSON,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss. :

GEORGE L. WHITMAN, being duly sworn, says that he is the petitioner named in the foregoing petition, which has been signed by him; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

GEORGE L. WHITMAN.

Subscribed and sworn to before me this 8th day of October, A. D. 1897.

WM. E. ZABRISKIE,
Notary Public (1),
N. Y. Co.

[SEAL.]